(3)

Supreme Court, U.S.
FILED
FEB 10 1998
OFFICE OF THE CLERK

No. 97-1152

In the Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, *ET AL.*,
Petitioners,

v.

HJB, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF INDIVIDUAL PLAINTIFF RESPONDENTS IN OPPOSITION TO PETITION

ARLIN M. ADAMS (*Counsel of Record*)
STEVE D. SHADOWEN
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
(215) 751-2000
Attorneys for Rite Aid Respondents

(*Full identification of these and other respondents filing this brief, and their counsel, is on next page and signature pages*)

32PP

THIS BRIEF IS FILED ON BEHALF OF THE INDIVIDUAL PLAINTIFF RESPONDENTS

THE INDIVIDUAL PLAINTIFF RESPONDENTS ARE ALL RESPONDENTS IDENTIFIED IN APPENDIX K TO THE PETITION (APP. 134-242A) EXCEPT THE NAMED PLAINTIFFS IN THE FEDERAL CLASS ACTION LISTED AT APP. 135-36A AND EXCEPT FULLERTON DRUG COMPANY, INC., CHICAGO DRUG COMPANY, INC., LTD. PHARMACY, INC., KADEL DRUGS, INC., BERDEL, INC., WEISS PHARMACY, INC., AND FOSTER-WESTERN PHARMACY, INC. (APP. 137A)

STATEMENT UNDER SUPREME COURT RULE 29.6

None of the Individual Plaintiff Respondents has a parent company or nonwholly-owned subsidiary, except as set forth below:

- The parent company of Pathmark Stores, Inc. (App. 136a) is PTK Holdings, Inc., which is a wholly-owned subsidiary of Supermarkets General Holdings Corp. The parent company of Supermarkets General Holdings Corp. is SMG-II Holdings Corp.

- The parent company of Revco D.S., Inc. (App. 136a) is CVS Corporation.

- The parent company of The Vons Companies, Inc. (App. 136a) is Safeway, Inc.

- The correct name of the respondent identified at App. 137a as Giant Food, Inc. is Giant of Maryland, Inc., the parent company of which is Giant Food, Inc.

- The parent company of Smitty's Super Valu, Inc. (App. 139a) is Smith's Food & Drug Centers, Inc.

- The parent company of Pharmhouse Corp. d/b/a The Rx Place (App. 139a) is Pharmhouse Corp.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

REASONS FOR DENIAL OF THE PETITION 8

I. THE QUESTION PRESENTED BY THE PETITION WAS NOT BRIEFED, ARGUED, OR DECIDED IN THE COURT OF APPEALS AND IS NOT PRESENTED BY THIS CASE 8

II. COURTS HAVE UNIFORMLY HELD THAT ANTI-TRUST PLAINTIFFS MAY RECOVER FOR PURCHASES MADE THROUGH CO-CONSPIRATOR MIDDLEMEN 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases *Page*

Abrams v. Interco Inc., 1980-2 Trade Cas. (CCH) ¶ 63,292 (S.D.N.Y. 1980) 13

Adams v. Pan American World Airways, Inc., 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 & 961 (1988). 11-12

Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985) 13-14

Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 1997 U.S. Dist. LEXIS 16733 (E.D. Va., Oct. 23, 1997) 13

Florida Power Corp. v. Granlund, 78 F.R.D. 441 (M.D. Fla. 1978) 13

Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980) 13-14

Gas-A-Tron of Arizona v. American Oil Co., 1977-2 Trade Cas. (CCH) ¶ 61,789 (D. Ariz. 1977) 13

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) .... *passim*

In re Anthracite Coal Antitrust Litigation, 1978-1 Trade Cas. (CCH) ¶ 62,059 (M.D. Pa. 1978) 13

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) 13

In re Cement & Concrete Antitrust Litigation, 1978-1 Trade Cas. (CCH) ¶ 62,069 (D. Ariz. 1978) 13

In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287 (D. Md. 1981) 13

Cases *Page*

In re Midwest Milk Monopolization Litigation, 730 F.2d 528 (8th Cir.), *cert. denied*, 469 U.S. 924 (1984) 13

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) 6

Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918 (3d Cir. 1986) 13

McCarthy v. Recordex Service, Inc., 80 F.3d 842 (3d Cir.), *cert. denied*, 117 S. Ct. 86 (1996) 13

Reiter v. Sonotone Corp., 486 F. Supp. 115 (D. Minn. 1980) 13

Rozema v. Marshfield Clinic, 977 F. Supp. 1362 (W.D. Wis. 1997) 13

Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874 (10th Cir. 1997) 14

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 10

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 4

Vermont v. Densmore Brick Co., 1980-2 Trade Cas. (CCH) ¶ 63,347 (D. Vt. 1980) 13

Statutes

Sherman Act § 1, 15 U.S.C. § 1 ..... *passim*

Other Authorities *Page*

1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (4th ed. 1997) 13

2 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW (rev. ed. 1995) 13

In the Supreme Court of the United States

OCTOBER TERM, 1997
No. 97-1152

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, *ET AL.*,
Petitioners,

v.

HJB, INC., *ET AL.*,
Respondents..

BRIEF OF INDIVIDUAL PLAINTIFF RESPONDENTS IN OPPOSITION TO PETITION

The question presented by the petition for certiorari bears no resemblance to anything briefed, argued, or decided by the Court of Appeals. Chief Judge Posner's opinion for that court held that, to the extent that the plaintiff retail purchasers of brand-name prescription drugs have sought to recover for a conspiracy by the drug manufacturers to maintain artificially high prices for drugs that the plaintiffs purchased *indirectly* through *non-conspirator* wholesalers, the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), *does* apply to bar the plaintiffs' claims. The opinion said nothing about creating any "new exception" to the rule of *Illinois Brick*. Chief Judge Posner's one-sentence observation that purchasers from wholesalers who *are* conspirators are *direct* — not indirect — purchasers is a correct statement of both fact and law. There is nothing about it that calls for review by this Court, and the petition therefore should be denied.

STATEMENT OF THE CASE

The claims. Thousands of community retail pharmacies (*see* App. 134-242a) have brought these coordinated and consolidated actions under Section 1 of the Sherman Act, 15 U.S.C. § 1, against the major manufacturers and wholesalers of brand-name prescription drugs. The plaintiffs allege a "unitary" conspiracy among the manufacturers and wholesalers "for the purpose of fixing, raising, maintaining, and stabilizing" the prices of the drugs (App. 53a) by, among other things, refusing "to make available to community pharmacies various discounts, rebates and other price-lowering mechanisms that each of the Manufacturer Defendants has made available to 'institutional' or 'managed' care buyers." App. 47a (footnote omitted).

The evidence. The record demonstrates that, in the district court's words, it is "virtually undeniable" that all of the manufacturer defendants maintained higher drug prices for community pharmacies than for managed care companies such as HMOs. App. 56-58a. In a decision that the manufacturers did not seek to appeal, the district court found ample evidence of a conspiracy among the manufacturers to maintain this two-tier pricing scheme: "Through a series of meetings, a continuous interchange of information, and an ultimate interchange of commitment, the defendants formed a cartel to prevent their discounting from spreading to the retail segment and to make sure that nobody strayed from this course." App. 62a. The evidence included a constant stream of meetings, communications, and conversations, at the highest levels of the industry (App. 63-64a); the creation and operation of a "chargeback" system — a collaborative industry-wide pricing system that precludes wholesalers from selling to community pharmacies low-priced drugs destined for favored purchasers — for maintenance of the differential pricing (*see* App. 2-3a (court of appeals' opinion)); and discussions about, and common action in response to, requests by community pharmacies for discounts or contract pricing (App. 58-61a). In contrast to the manufacturers' argument that the difference in pricing was just a reflection of managed care's better ability to move sales to competitors' drugs if price concessions

were not granted, the evidence showed that manufacturers actually knew that community pharmacies had that same ability but denied them managed care's more favorable price levels anyway. App. 67-71a.

The record contains ample evidence that the conspiracy among the manufacturers also extended to the wholesaler defendants, who were particularly interested in stopping the spread of retail pharmacy buying groups that might displace the wholesalers' role. The wholesalers were fully aware of the manufacturers' agreement not to sell at discounts to these buying groups (*see* App. 59a (quoting testimony by wholesaler)), and they willingly participated in it. In the words of the court of appeals, "the record discloses a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." App. 24a. Though the court of appeals did not quote the "tasty morsels" and "smoking guns" in the record that comprise this evidence (*id.*), the proof consists of documents and testimony that the wholesalers "invented" and "developed" the chargeback system for the manufacturers to prevent "diversion" to disfavored purchasers of low-priced drugs intended for managed care, and documents and testimony about wholesalers' exhortations to prevent retail buying groups from growing through the availability of discounts. Again in the words of the court of appeals (App. 25-26a):

> "Desiring a piece of the action with the favored customers, who were proliferating, the wholesalers agreed to implement a chargeback system that would shore up the manufacturers' system of price discrimination, an integral component of the price-fixing conspiracy. And desiring to discourage buying groups they joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing the advantages of membership."

Petitioners are correct that "the wholesalers have never been plaintiffs in this litigation." Pet. at 13 n.11. Whether the wholesalers could have brought claims against the manufacturers despite their own involvement in the conspiracy has never been determined in this case. Instead, as *co-defendants*, the wholesalers entered into a judgment-sharing agreement with the manufacturers in which they released any antitrust claims they might have had against the manufacturers. *See* App. 102-09a. The petitioners refer to this judgment-sharing agreement and release as a "settlement."

The district court's decision. Both the manufacturers and the wholesalers moved for summary judgment on the ground that there was insufficient evidence that they had participated in an antitrust conspiracy. In an April 4, 1996, decision, the district court denied the manufacturers' motion but granted the wholesalers' motion. Despite a wealth of evidence to the contrary, the court concluded that the record was devoid of proof that the wholesalers joined with the manufacturers in their anticompetitive scheme. App. 80a. The court said that the wholesalers refrained from "diverting" lower-priced drugs to retailers because of federal statutory restrictions on drug resale, rather than because of their chargeback system. App. 84-85a. The court also emphasized the wholesalers' claimed reluctance to participate in discriminatory pricing (a reluctance based, in fact, on a hostility to *any* discounting) and suggested (contrary to this Court's decision in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)) that the participation should be excused because it was the result of manufacturer coercion. *See* App. 80-82a, 89-91a.

The district court then turned to the manufacturers' motion for summary judgment under *Illinois Brick* with respect to those claims based on purchases made by plaintiffs from the wholesalers. The court explained that it previously had denied summary judgment on this issue because, at that earlier stage of the litigation, there appeared to be viable claims of "a giant vertical price-fixing conspiracy" involving joint misconduct by the manufacturers and wholesalers, making *Illinois Brick* inapplica-

ble. Now, however, the court had concluded that the wholesalers were not a part of that conspiracy, so that an *Illinois Brick* analysis was necessary. App. 92a, 96a. Performing that analysis, the court held that the facts fell within an exception under *Illinois Brick* for direct purchasers that are controlled by their suppliers, and it therefore denied summary judgment on the "indirect purchaser" claims. App. 95-101a.

The district court certified its *Illinois Brick* holding for interlocutory review and entered a final judgment in favor of the wholesalers under Federal Civil Rule 54(b), enabling immediate appeals of both issues. App. 35-44a.

The court of appeals' decision. The court of appeals accepted the *Illinois Brick* interlocutory appeal (App. 33-34a) and ordered that briefing be limited to this question (App. 31a):

> "In a private action under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, whether the *Illinois Brick* doctrine bars price-fixing damage claims of indirect purchaser-retailers against manufacturers on the indirect purchaser-retailers' purchases from wholesalers, which are separate companies neither owned by any manufacturer nor co-conspirators of any manufacturer?"

The interlocutory appeal was consolidated with an appeal of the judgment in favor of the wholesalers and two other appeals that are not relevant here. App. 30a.

In his opinion for the court of appeals, Chief Judge Posner addressed the *Illinois Brick* issue first, and began with this introduction (App. 6a):

> "The indirect purchaser issue (with which we begin) is separate from the issue of the wholesalers' participation in the manufacturers' alleged conspiracy. *It is true that if we reversed the judge's ruling on the latter issue and so reinstated the wholesalers as*

> *defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators.* [Citations omitted; emphasis added.] But even if we do reinstate the wholesalers as defendants, an issue discussed later in this opinion, the plaintiffs may fail at trial to establish their liability, in which event the indirect-purchaser issue will be decisive. So, the issue being fully briefed and argued in this court, we should decide it; and the fact that it may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue . . . ."

Following this introduction, the court of appeals reversed the district court's holding that *Illinois Brick* did not bar plaintiffs' claims even though (in the district court's view) the wholesalers were not co-conspirators. The court reviewed *Illinois Brick* and *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), and concluded that "the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself — 'where the direct purchaser is owned or controlled by its customer,' 431 U.S. at 736 n. 16, or, we suppose, vice versa." App. 7-8a. The court rejected the district court's holding that these exceptions applied to the wholesalers. App. 8-9a. Having noted that one rationale underlying *Illinois Brick* is avoidance of the "famously difficult" task of tracing a price hike through different tiers of purchasers and apportioning damages among the tiers (what the court of appeals called "incidence analysis," App. 7a), the court observed that if the wholesalers had not released their claims against the manufacturers, this precise tracing and apportionment problem would apply to plaintiffs' claims — a fact confirming that *Illinois Brick* should bar recovery. App. 9a.

After a long intervening discussion of some unrelated issues in another of the consolidated appeals, the court turned to "the question whether the wholesalers should have been dropped as defendants." App. 24a. Reversing the district court, the court

of appeals held that there was sufficient evidence in the record — items the court labeled "tasty morsels" and "smoking guns" — to permit plaintiffs to reach a jury on the question of the wholesalers' involvement in the conspiracy. *Id.* Rejecting the wholesalers' argument to the contrary, the court held that the plaintiffs' theory of recovery — that the manufacturers and wholesalers "shore[d] up" their cartel through the chargeback system — "makes perfectly good [economic] sense" because threats posed to the wholesalers by retail buying groups gave them an incentive to try to discourage discounting to such groups. The court found that the evidence supported that theory. App. 24-26a. In conclusion, the court, referring to the wholesalers' release of claims against the manufacturers, stated that the presence of such claims could have "no significance" to whether plaintiffs stated viable claims against the wholesalers. App. 27a. Although *Illinois Brick* entitles direct purchasers to sue their customers and thereby "sows dishonor among thieves," the court pointed out that direct purchasers like the wholesalers "still may *be* thieves." *Id.* (emphasis in original).[1]

The court's decision was unanimous. The panel denied a petition for rehearing, and the full court of appeals refused a suggestion of rehearing en banc when no active member of the court asked for a vote on it. App. 131-32a.

---

1. The wholesalers have filed a separate petition for certiorari at No. 97-1148 seeking review of the reversal of summary judgment in their favor. One of the other consolidated appeals dealt with the district court's jurisdiction to hear a class action alleging violations of the Alabama antitrust statute, and a separate petition for certiorari from that decision has been filed at No. 97-775.

REASONS FOR DENIAL OF THE PETITION

I. THE QUESTION PRESENTED BY THE PETITION WAS NOT BRIEFED, ARGUED, OR DECIDED IN THE COURT OF APPEALS AND IS NOT PRESENTED BY THIS CASE.

A reading of the petition for certiorari in conjunction with Chief Judge Posner's opinion provokes wonderment whether the two documents relate to the same case. The decision below bears no resemblance to the decision described in the petition. The issue the petition seeks to present — whether Chief Judge Posner erred in creating some "new exception" to *Illinois Brick* that permits purchasers from settling wholesalers to recover for passed-on overcharges needing allocation among sales tiers — does not appear anywhere in the opinion below or anywhere else in this case. Chief Judge Posner did not create the "new exception" fabricated in the petition, and there is no occasion for this Court to consider the issue here.

Petitioners' "Statement of the Case" claims difficulty following the court of appeals' reasoning (Pet. at 12), but that can only be because the "analysis" petitioners seek to "follow" does not exist. According to the petition, the court of appeals *began* its opinion by reversing the summary judgment in favor of the wholesalers, then reversed the district court's "owned or controlled" holding under *Illinois Brick*, and then "did not end its *Illinois Brick* analysis there" but instead "went on to consider the impact under *Illinois Brick* of a finding of wholesaler involvement in the alleged collusion." Pet. at 11. The petition quotes the court's statement at App. *8-9a* (made in the context of an assumption that the wholesalers were not co-conspirators) that the wholesalers are the only entities permitted to sue the manufacturers, and then, quoting App. *6a*, says that "[t]he court *later* stated" that the indirect purchaser defense would go by the board if the wholesalers were conspirators because that would make plaintiffs direct purchasers from those conspirators. Pet. at 12 (emphasis added). Finally, jumping back to the court's discussion at App. 9a of why the policies underlying *Illinois Brick* would be even more evident if the wholesalers had not released

the manufacturers, petitioners assert that the court made "the viability of [plaintiffs'] damage claims . . . depend on whether or not the manufacturers settle with the wholesalers: If there is no settlement, [plaintiffs'] claims are barred . . . . If a settlement is reached, however, then [plaintiffs'] claims somehow are activated." Pet. at 12-13.

Petitioners' description of the opinion below is contrived, fanciful, and disingenuous. Contrary to petitioners' suggestion, the court of appeals did not engage in some bizarre effort to create new exceptions to the *Illinois Brick* rule; the court merely prefaced its application of and adherence to that rule with a brief introduction explaining why it was addressing the issue at all in light of its upcoming reversal of the wholesaler summary judgment, which arguably rendered the indirect purchaser issue moot. The preface merely made the unassailable observation that if the wholesalers are conspirators, the plaintiffs are *direct* purchasers from those conspirators and *Illinois Brick* would not apply. App. 6a. Rather than create a new exception to *Illinois Brick*, the court of appeals took pains to emphasize its view that there are *no* exceptions other than those set forth in the *Illinois Brick* decision itself. App. 7-8a.[2]

---

2. Some of the courts and commentators cited in the next segment of this brief as in accord with the view that *Illinois Brick* does not bar actions by purchasers from co-conspirator middlemen, have characterized this result as an "exception" to *Illinois Brick*. But, as Chief Judge Posner's language makes clear, such a label is just the product of confused analysis. This is not a situation in which, although *Illinois Brick* normally would *preclude* suit because the plaintiff's injury results from a pass-on of harm through purchase from an innocent middleman, the court *excuses* (makes an *exception* to) that preclusion for some overriding policy or other reason. Rather, this is a situation in which application of the rule of *Illinois Brick* itself — that suit must be by a direct, not an indirect, purchaser — *permits* the plaintiff to sue as a *direct purchaser* from a wrongdoer. It is a direct application of *Illinois Brick*, not an "exception."

Petitioners characterize the question they seek to bring before this Court as whether to permit "indirect-purchasing retailers to recover overcharge damages against manufacturers alleged to have conspired in violation of Section 1 of the Sherman Act" where five numbered conditions or qualifiers are present. *See* Pet. at i. Petitioners fail to list among those conditions or qualifiers the fact that the middlemen from which the "indirect-purchasing retailers" bought were themselves members of the manufacturers' conspiracy — the one factor that caused the court of appeals to state that plaintiffs may be able to recover in this case despite *Illinois Brick*. Undoubtedly, petitioners' failure to list this essential factor in the Question Presented results from the unanimity of court decisions (cited in the next part of this brief) permitting recovery in this situation. Thus, petitioners have larded the Question Presented with their quintet of extraneous conditions or qualifiers that had no significance to the reasoning of the court of appeals, and petitioners argue that these factors make this case worthy of review. But the court of appeals' decision did not turn on any of these factors, making review of them here inappropriate.

For example, petitioners say that the court of appeals made a "finding" that any recovery by plaintiffs as direct purchasers from the wholesaler co-conspirators would require a tracing and apportionment of overcharges to each tier in the chain of sale — the "famously difficult" type of "incidence analysis" that *Illinois Brick* sought to avoid. Pet. at 16-17; *see id.* at 11-12. But the court of appeals "found" no such thing. The court said that this litigation involves passed-on overcharges and a need for incidence analysis only in the context of explaining why *Illinois Brick* would bar plaintiffs' recovery if the wholesalers *are not* co-conspirators. *See* App. 7-9a. The court did not discuss how damages would be measured if the wholesalers *are* proven to be co-conspirators, but the question is not novel: as co-conspirators, the wholesalers and manufacturers would be jointly and severally liable for all damages caused by all conspirators, without a right of contribution (*Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). Plaintiffs could recover the full amount of the overcharges imposed *directly* by any co-

conspirator (including any of the wholesalers or manufacturers). No incidence analysis would be needed.

Petitioners also say that the court of appeals made a "finding" that both the wholesalers and the plaintiffs could recover damages in this case, thus permitting a "double recovery" against the manufacturers. Pet. at 17; *see id.* at 12, 22-23. But the court said simply that the summary judgment in the wholesalers' favor should be reversed even though *Illinois Brick* "entitle[d]" the wholesalers to sue the manufacturers as direct purchasers from them, "sow[ing] dishonor among thieves." App. 27a. The court pointedly added that the wholesalers nevertheless may *be* thieves. *Id.* In other words, the conspirators cannot immunize themselves from antitrust liability by suing each other or, as in this case, paying each other off through a judgment-sharing agreement or "settlement". There is nothing novel about this conclusion that calls for this Court's review.

Finally, petitioners accuse the court of appeals of creating some sort of new rule that makes plaintiffs' ability to sue dependent on whether the wholesalers settled with the manufacturers, and petitioners say that conditioning the applicability of an *Illinois Brick* defense on whether the middleman settled with the manufacturers conflicts with the D.C. Circuit's decision in *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24 (1987), *cert. denied*, 485 U.S. 934 & 961 (1988). Pet. at 12-13, 20-22. But, again, the court of appeals did nothing resembling petitioners' accusation. The court made a passing reference to the wholesalers' release of the manufacturers only in connection with its explanation of how, if the wholesalers were *not* co-conspirators and settlement had not occurred, the case would present (in the court of appeals' view) a classic need for incidence analysis, demonstrating that *Illinois Brick* should bar plaintiffs' claims. App. 9a.

Indeed, the court of appeals held that plaintiffs' claims would be barred under *Illinois Brick* if the wholesalers were not co-conspirators, despite the fact that the wholesalers had settled with the manufacturers. *Id.* Thus, contrary to petitioners' argu-

ment, the court's ruling was not in conflict with cases holding that settlement has no bearing on application of *Illinois Brick*. Nor does the wholesalers' "settlement" with the manufacturers preclude the plaintiffs from recovering against both the wholesalers and the manufacturers if the wholesalers *are* co-conspirators. App. 6a-7a. The "settlement" is simply irrelevant, just as it was in *Adams*.

In short, the question on which the petitioners seek a writ of certiorari is not raised in the court of appeals' decision and does not exist in this case.

II. COURTS HAVE UNIFORMLY HELD THAT ANTITRUST PLAINTIFFS MAY RECOVER FOR PURCHASES MADE THROUGH CO-CONSPIRATOR MIDDLEMEN.

At the outset of the court of appeals' opinion, Chief Judge Posner observed that if the wholesalers are proven to be conspirators, then plaintiffs purchasing from them are *direct* purchasers from the conspirators and "any indirect purchaser defense would go by the board." App. 6a. This conclusion is indisputable.

Illinois Brick was concerned with whether plaintiffs who seek to recover passed-on overcharges with respect to products bought through *non-conspirator* middlemen should be permitted to sue the suppliers who imposed the overcharges on the middlemen. In holding that plaintiffs may not recover in such circumstances, this Court created what defendants, among others, insist on calling the "indirect purchaser doctrine" — a rule that those who do not purchase directly from a conspirator may not recover the overcharges. It necessarily follows that those who *do* purchase directly from a conspirator *may* recover the overcharges.

Nothing in *Illinois Brick* suggests anything to the contrary. The facts that, as here, the members of the conspiracy include both manufacturers and wholesalers, and that some of the plaintiffs' purchases are made from the wholesalers, make no difference under this analysis. As co-conspirators, the

wholesalers and manufacturers are jointly and severally liable for the overcharges on the sales *by every member of the cartel*. This result does not mean that there is a "new exception" to *Illinois Brick*; it means that there is no bar to suit under the rule of *Illinois Brick* itself because the plaintiffs did not purchase through a non-conspirator intermediary.

Petitioners cite no case that is inconsistent with this result. In fact, whether or not they label the result an "exception," every court to consider the issue has held that *Illinois Brick* does not bar recovery by plaintiffs who purchase from intermediaries that participated in the conspiracy. *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212-13 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1375 (W.D. Wis. 1997); *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*, 1997 U.S. Dist. LEXIS 16733 (E.D. Va., Oct. 23, 1997); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1295-96 (D. Md. 1981); *Abrams v. Interco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,292, at 75,552 (S.D.N.Y. 1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 119-20 (D. Minn. 1980); *Vermont v. Densmore Brick Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,347, at 75,778 (D. Vt. 1980); *Florida Power Corp. v. Granlund*, 78 F.R.D. 441, 443-44 (M.D. Fla. 1978); *In re Anthracite Coal Antitrust Litigation*, 1978-1 Trade Cas. (CCH) ¶ 62,059, at 74,587 (M.D. Pa. 1978); *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789, at 73,245 (D. Ariz. 1977). *See also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842, 854 (3d Cir.), *cert. denied*, 117 S. Ct. 86 (1996); *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 931 (3d Cir. 1986); *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 529-532 (8th Cir.), *cert. denied*, 469 U.S. 924 (1984); *In re Cement & Concrete Antitrust Litigation*, 1978-1 Trade Cas. (CCH) ¶ 62,069 (D. Ariz. 1978); 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 774-75 (4th ed. 1997); 2 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 371h at 264-65 (rev. ed. 1995). If this weren't

the law, there never could be recovery in vertical conspiracy cases.[3]

In addition to being unassailable, the conclusion that plaintiffs may pursue overcharges from co-conspirator middlemen is also not ripe for review. As Chief Judge Posner pointed out, how this issue plays out depends on the outcome at trial. If the jury concludes that the wholesalers are not co-conspirators, the issue will disappear because plaintiffs will be indirect purchasers from the manufacturer conspirators and unable to recover under the holding of the court of appeals. Only if the jury concludes that the wholesalers are indeed co-conspirators will plaintiffs' ability to recover as direct purchasers become relevant. If the issue still exists at that time and petitioners still

---

3. Petitioners' efforts to distinguish these cases are unavailing. For example, petitioners say the consumer plaintiffs in *Arizona v. Shamrock* avoided an *Illinois Brick* bar on claims against wholesalers only because they changed their theory to claim a conspiracy by retailers to fix retail prices (Pet. at 19), but in fact the court in *Shamrock* held that *Illinois Brick* did not bar the consumers' two-tier conspiracy claim against wholesalers *and* retailers because their purchases were made from retailers as co-conspirators (729 F.2d at 1211-14). Petitioners say the *Fontana* case turned on the specific nature of the conspiracy and damages at issue there (Pet. at 19), but the court in *Fontana* drew no such distinction, rejecting application of *Illinois Brick* "in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer" (617 F.2d at 481). Petitioners also quote a statement in *Sports Racing Services, Inc. v. Sports Car Club of America, Inc.*, 131 F.3d 874, 889 (10th Cir. 1997), that secondary purchasers' claims are barred under *Illinois Brick* because the middleman may bring suit. Pet. at 19 n.14, 23. But petitioners ignore the Tenth Circuit's further comment, made as part of its discussion of who may bring vertical conspiracy claims, that the proper plaintiff is "the first 'innocent' purchaser in the chain of distribution — the direct victim of the anticompetitive activity . . . ." 131 F.3d at 889. That "first innocent purchaser" analysis is fully in accord with the cases permitting recovery by direct purchasers from middlemen co-conspirators. In this litigation, the plaintiffs are the first innocent purchasers.

wish to dispute it, they can raise it again in the court of appeals and, upon losing there, can seek review by this Court. Until then, however, the question is abstract and premature, and this Court should not spend time considering it.

CONCLUSION

The petition is based on a contrived characterization of the opinion below. The court of appeals' decision does not raise the issues petitioners seek to present to this Court, and the court of appeals' conclusion that antitrust plaintiffs may recover for purchases made through co-conspirator middlemen comports with the unanimous view of every court that has considered the issue. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARLIN M. ADAMS
STEVE D. SHADOWEN
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
(215) 751-2000
Attorneys for Rite Aid Respondents

DOUGLAS H. PATTON
GIAUQUE, CROCKETT, BENDINGER & PETERSON
First Interstate Plaza
170 South Main, Suite 400
Salt Lake City, Utah 84101-1664
(801) 533-8383

RICHARD A. ARNOLD
SCOTT E. PERWIN
KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, P.C.
Suite 301, 107 E. Main Street
Rogersville, Tennessee 37857-3347
(423) 272-4888
Attorneys for Albertson's Respondents

PAUL E. SLATER
SPERLING, SLATER & SPITZ
3300 Xerox Centre
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200

RICHARD L. COFFMAN
RICHARD L. COFFMAN, P.C.
550 Fannin Street, Suite 1212
Beaumont, Texas 77701
(409) 832-9422
Attorneys for Malley's Respondents

MARY BOIES
BOIES & MCINNIS LLP
Empire Building, Suite 5
Post Office Box No. 67
Village Green
Bedford, New York 10506
(914) 234-3700

NICHOLAS GRAVANTE
BARRETT GRAVANTE CARPINELLO & STERN LLP
1585 Broadway
New York, New York 10036
(212) 969-5647
Attorneys for Boies-Gravante Respondents